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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO CORTEZ,

Defendant and Appellant.

F063795

(Super. Ct. No. CRF34387)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tuolumne County. Eric L. DuTemple, Judge.

Carol Foster, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J., and Poochigian, J.

A jury convicted appellant, Roberto Cortez, of committing a lewd or lascivious act upon a child under the age of 14 (Pen. Code, § 288, subd. (a); count 2), and appellant admitted enhancement allegations that he had served three separate prison terms for prior felony convictions (Pen. Code, § 667.5, subd. (b)). The jury was unable to reach a verdict on a charge of committing a forcible lewd or lascivious act upon a child under the age of 14 (Pen. Code, § 288, subd. (b)(1); count 1), and pursuant to the prosecution's motion, the court dismissed the count 1 charge. The court imposed a prison sentence of 11 years, consisting of the eight-year upper term on the substantive offense and one year on each of the three prior prison term enhancements.

Appellant's appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant himself has filed with the court a document, to which we will refer as a letter brief, in which it appears he argues that he was denied his right to the effective assistance of trial and appellate counsel, and that the prosecutor committed misconduct. We affirm.

FACTS¹

In December 2010, Y.'s household included her daughter, referred to at trial as Jane Doe (Jane), then 12 years old; Y.'s "babies," i.e., her twins, then two years old, and her youngest daughter, then one year old; and appellant, her husband.² Appellant is the biological father of the babies. He is not Jane's biological father.

On the morning of December 27, 2010, as Y. was getting ready to go to work, appellant asked her to call Jane to come to the couple's bedroom, where the babies also slept, to help with the babies. Y. did so, Jane came into the room, and Y. left for work.

¹ Our factual summary is limited to the count 2 offense.

² Except as otherwise indicated, our factual statement is taken from Y.'s testimony.

Later that afternoon, after she had come home from work, Y. found Jane in the corner of a room, crying. When Y. questioned her as to what was wrong, she mentioned appellant's name. Eventually, Y. asked Jane if appellant "had sex with [her]," and Jane said "'Yes.'" Y. questioned Jane further, and Jane told Y. "her back was against ... his penis," "there was a lot of movement," and appellant "touched her private" Jane also told Y. that she changed her clothes because she "had a lot of sticky stuff"

At some point on the afternoon of December 27, Y. noticed appellant's boxer shorts hanging on the shower door. This was unusual because during their marriage "he's never done laundry So for him to do something like that, it was not right." A police officer testified that appellant stated he hand-washed his shorts because he had set them on the floor and they had gotten wet.

Jane testified to the following: One morning in December 2010, when she first woke up in her bedroom, her mother asked her to help appellant with the babies. Jane entered her mother's room; appellant and the babies were there. After changing a diaper on one of the babies and giving her a bottle, she lay down on the bed. She was wearing pajama bottoms and a shirt. Appellant was also lying on the bed. He was wearing underwear. He "skidded close" to Jane and began "hugging" her. He "push[ed] [Jane] close to him like really hard." She could "feel his privates" touching her "[b]etween [her] legs." Appellant was "moving his [penis] between [her] legs" and "moving [her] privates so he could touch it."

DISCUSSION

Prosecutorial Misconduct

Appellant charges the prosecutor with three instances of misconduct. First, he argues that the prosecutor impermissibly made reference to appellant's decision not to testify. He relies on *Griffin v. California* (1965) 380 U.S. 609. There, the United States Supreme Court held that "the Fifth Amendment ... forbids ... comment by the prosecution on the accused's silence" (*Id.* at p. 614.) We have examined the trial record and we have determined that the prosecutor at no time, either directly or indirectly, referred to appellant's decision not to testify. Therefore, his claim of *Griffin* error fails.

Second, appellant argues that the prosecutor impermissibly vouched for the credibility of one or more witnesses. Appellant bases this claim on the following principle: "A prosecutor may comment upon the credibility of witnesses based on facts contained in the record, and any reasonable inferences that can be drawn from them, but may not vouch for the credibility of a witness based on personal belief or by referring to evidence outside the record. [Citations.]" (*People v. Martinez* (2010) 47 Cal.4th 911, 958.) Based on our review of the record, we conclude that the prosecutor presented argument concerning the credibility of witnesses, but in doing so, did not impermissibly vouch for their credibility.

Finally, appellant argues that the prosecutor failed to "correct" the testimony of a "star" prosecution witness that contradicted that witness's statements to police.³ This claim too is without merit.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's ... intemperate behavior violates the federal

³ Here, and in all instances in which we quote appellant's letter brief, unnecessary capitalization is omitted.

Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” (*People v. Gray* (2005) 37 Cal.4th 168, 215-216, internal quotation marks omitted.) Under this standard, any failure by the prosecutor to note inconsistencies in a witness’s testimony did not constitute misconduct.

Ineffective Assistance of Counsel

To establish a violation of the Sixth Amendment right to the effective assistance of counsel, “a defendant must show both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney and that counsel’s deficient performance resulted in prejudice to defendant” (*People v. Lewis* (2001) 25 Cal.4th 610, 674.) Appellant argues that trial counsel was ineffective for failing to object to the claimed instances of prosecutorial misconduct and that appellate counsel was ineffective for failing raise the issue on appeal. These claims also fail. As demonstrated above, appellant’s claims of prosecutorial misconduct are meritless. Therefore, the failure to raise such claims, either at trial or on appeal, did not constitute constitutionally deficient performance.

Appellant also argues that trial counsel was ineffective because at trial he did not present evidence that Y. committed perjury in a civil action, was “pregnant with another man’s baby,” and has a “history of crying wolf, and sending suitors to prison.” None of this purported evidence is reflected in the appellate record. Therefore, appellant’s claims based on this evidence are not cognizable on appeal. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1183 [“review on a direct appeal is limited to the appellate record”].)

Independent Review of the Record

Following independent review of the record, we have concluded that no reasonably arguable legal or factual issues exist.

DISPOSITION

The judgment is affirmed.